Supreme Court of The United States

October Term, 1958

No. 584

LOUISE LASSITER,
Appellant,
vs.
NORTHAMPTON COUNTY BOARD OF ELECTIONS
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

BRIEF OF THE ATTORNEY GENERAL OF NORTH CAROLINA AMICUS CURIAE

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INTEREST OF THE STATE OF NORTH CAROLINA

The State of North Carolina, through its Attorney General, files this Brief as amicus curiae under the provisions of Paragraphs 4 and 5, Rule 42 of the Revised Rules of the Supreme Court of the United States. Previously the Attorney General filed a Motion to Dismiss in this case (October Term, 1958—No. 229, Misc.) and since that time the Northampton County Board of Elections, desiring to present its argument through its own Counsel, the Attorney General desires to present this Brief as expressing the views of the State of North Carolina.

The issue in this case involves a State-wide question as to the validity and constitutionality of that portion of Article VI, Sec. 4 of the Constitution of North Carolina, which requires every person presenting himself for registration to be able to read and write any section of the Constitution in the English language (see Appendix B herein) and the validity

and constitutionality of Sec. 163-28 of the General Statutes of North Carolina, which enacts the same requirements as to reading and writing any section of the Constitution of the State (see footnote No. 1 to Opinion of 3-Judge Federal Court Appendix A herein, and see Appellant's Brief, p. 8, for section of statute in question). This requirement of the bare minimum in educational qualifications as a prerequisite to voting according to the Opinion of the 3-Judge Federal Court in this case, is in force in 19 states of the Union, only seven of which are Southern states (LASSITER v. TAYLOR, 152 F. Supp. 295—see also Appendix A herein).

The Attorney General of North Carolina as the chief law officer of the State desires to express his views since there is at stake a vital constitutional statutory policy that has been in effect for many years. Furthermore, this is an open and bald attempt to make eligible for voting and for political purposes a mass of illiterate and uneducated persons who will be docile and tractable, who will not understand the issues involved in any election but who will vote at the dictates of their leaders. This statement would be true as to both white and colored voters since the Suffrage requirements as to reading and writing any section of the Constitution in the English language apply equally to both white and colored prospective voters.

OPINION BELOW

The Opinion of the Supreme Court of North Carolina from which this appeal was filed is reported as: 248 N. C. 102, 102 S. E. 2d 853. The Opinion also appears in the Transcript of Record before this Court on pp. 19-33. The Opinion of the Supreme Court of North Carolina was filed on the 9th day of April, 1958, and the decree of the Supreme Court of North Carolina affirming the Judgment of the Superior Court of Northampton County was entered on the 21st day of April 1958 (see Transcript of Record, p. 34). This Court noted probable jurisdiction (R. 39) on December 12, 1958, (see LASSITER v. NORTHAMPTON COUNTY BOARD OF ELECTIONS, No. 239 Misc., 79 S. Ct. 294).

JURISDICTION

The Attorney General of North Carolina contends that this Court does not have jurisdiction for the reason that the 3-Judge District Court of the United States expressly retained jurisdiction of the cause; that the Supreme Court of North Carolina did not decide any federal constitutional issue in this case; that if this Court holds a federal constitutional issue was decided, then the decision of the State Court rests upon a nonfederal basis which independently and adequately supports the State Court Judgment, and, furthermore, in view of the previous decisions of this Court a substantial federal question is not raised in this case. These positions will be set forth in more detail in the Argument appearing in this Brief.

QUESTIONS PRESENTED

I In view of the Opinion of the 3-Judge Federal Court in this case and considering the Record and the Opinion of the Supreme Court of North Carolina, does this Court have jurisdiction to hear and dispose of this case?

II Putting to one side the question of jurisdiction: are the various states of the Nation precluded by the 14th, 15th and 17th Amendments to the Constitution of the United States from requiring a literacy test, such as reading and writing any section of the Constitution of the State in the English language, as a condition precedent to registration and voting?

STATEMENT OF THE CASE

This cause was originally instituted in the District Court of the United States for the Eastern District of North Carolina, Raleigh Division. The Plaintiff sought to have the Federal Court declare unconstitutional the literacy test for voters required by Article VI, Sec. 4 of the Constitution of North Carolina, and Sec. 163-28 of the General Statutes, as that section appeared at the time of the institution of the action. The Plaintiff sought an injunction restraining the Registrar from denying registration to the Plaintiff on the ground of

failure to comply with the literacy test. Before this case was heard in the 3-Judge Federal Court Sec. 163-28 of the General Statutes was revised and omitted the so-called "Grandfather" Clause and also repealed the requirement that the reading and writing of any section of the Constitution had to be to the "satisfaction of the registrar". After the statute was revised the Plaintiff attacked the revised statute in a reply that was filed in the action pending before the 3-Judge Federal Court.

The 3-Judge Federal Court heard the case, evidence was introduced and the parties stated their contentions and arguments and were allowed time to file briefs. Subsequently the 3-Judge Federal Court entered an Order or Opinion, retaining jurisdiction and staying the action until the Plaintiff could exhaust her administrative remedy in the State Court and secure an interpretation of the statute by the Supreme Court of North Carolina in the light of the provisions of the State Constitution (LASSITER v. TAYLOR, 152 F. Supp. 295—decided June 10, 1957).

The Plaintiff again applied to the Registrar for registration as a voter on the 22nd of June, 1957, and refused to take the literacy test required by the statute. Upon being denied registration the Plaintiff appealed to the Board of Elections of Northampton County, and upon this Board upholding the Registrar the Plaintiff appealed to the Superior Court of Northampton County, which Court held the Plaintiff was not entitled to register. The Plaintiff then appealed to the Supreme Court of North Carolina, which entered the Opinion and Mandate which is the subject of this appeal to this Court (see R. 2, et seq.).

In the Superior Court of Northampton County, which is a State Court of general jurisdiction, the case was heard upon Stipulations of Counsel as to the facts of the case, which begin on R. 6 and continue through R. 10. The Opinion of the Supreme Court of North Carolina gives the history of Article VI of the Constitution of North Carolina relating to the Suffrage provisions of the State, and this history begins at the

bottom of R. 25 and extends through R. 30. It is believed that this history of the various provisions of the Suffrage Article of the North Carolina Constitution and its subsequent amendments is correct.

SUMMARY OF ARGUMENT

The Brief of the Attorney General of North Carolina contends that this Court does not have jurisdiction of this cause for the reason that the 3-Judge Federal Court expressly retained jurisdiction of the case, saying, (LASSITER v. TAYLOR, 152 F. Supp. 295):

> "Before we take any action with respect to the Act of March 27, 1957, however, we think it should be interpreted by the Supreme Court of North Carolina in the light of the provisions of the State Constitution. *Government and Civic Employees Organizing Committee, etc.* v. *S. F. Windsor*, 77 S. Ct. 838. We think, also, that administrative remedies provided by the act should be exhausted before action by the federal courts is invoked. *We shall accordingly enter an order staying action herein to retain jurisdiction for a reasonable time to enable plaintiffs to take action in the Courts of North Carolina to obtain an interpretation of the statute and to exhaust administrative remedies thereunder.*
>
> "Action stayed." (Emphasis ours)

The position or status of the case having been developed before a 3-Judge Federal Court and the evidence in the case having been introduced and arguments made to the Court, this case should, therefore, be determined by the 3-Judge Federal Court and the jurisdiction of that Court should not be ousted because the Appellant apparently does not like the result as intimated in the 3-Judge Federal Court's Opinion and seeks to escape the results of the Federal record by raising Federal constitutional questions in the State Court. In raising Federal constitutional questions in the State Court, the Appellant herein violated the Order of the Federal Court which directed the Appellant herein to exhaust administrative remedies in the State Court and to obtain a construction

of Article 6 of Chapter 163 of the General Statutes, beginn with G. S. 163-28, in the light of the provisions of the S Constitution. If the Appellant can thus disregard the m date of the 3-Judge Federal Court, then the doctrine Equitable Abstention, as developed by this Court and various Circuit Courts of Appeal over the last 25 ye amounts to nothing.

The Attorney General further contends that the Opin of the Supreme Court of North Carolina (R. 19) shows t the whole decision is predicated upon a question of a c struction of the State Constitution and State Statute (question stated by the Chief Justice at bottom of R. 2 The statement at the end of the Opinion: "Hence there is conflict with either the 14th, 15th or 17th Amendments the Constitution of the United States", is simply a collate statement which had nothing to do with the precise quest stated by the Court. This Court has said that in litigat the atmosphere in which an opinion is written and the necessarily broad statements that are made imposes u this Court the duty to look beyond the broad sweep of language and determine precisely for itself the ground u which the judgment rests (BLACK v. CUTTER LABO TORIES, 351 U. S. 292, 100 L. ed. 1188, 76 S. Ct. 824). this respect the Attorney General contends that the Opini or Decision, of the State Supreme Court rests upon a n federal ground which fairly, independently and adequat supports the State Court Judgment.

Finally, as to the question of jurisdiction, if this Co decides that the federal question was properly raised a passed upon by the State Court, then in view of the decisi of this Court the question is not substantial. The Attor General concedes that the "Grandfather" Clause in the S Constitution is invalid and unconstitutional, and therefo concedes that any State statute in which there is incorpora the features of the "Grandfather" Clause is also invalid a unconstitutional. The only question left, therefore, is validity of the literacy test, and this Court has said that s a test is valid (GUINN v. UNITED STATES, 238 U. S. 3

360, 35 S. Ct. 932, 59 L. ed. 1340; WILLIAMS v. MISSISSIPPI, 170 U. S. 213, 18 S. Ct. 583, 42 L. ed. 1012; DAVIS v. SCHNELL, D. C., 81 F. Supp. 872, affirmed 336 U. S. 933, 69 S. Ct. 749, 93 L. ed. 1093; TRUDEAU v. BARNES, C.C.A. 5, 65 F. 2d 563, cert. den. 290 U. S. 659, 54 S. Ct. 74 78 L. ed. 571).

Aside from the jurisdiction and as to the merits of the case, the Attorney General contends that a State statute requiring a bare literacy test to the effect that the applicant for registration is only required to read and write a provision of the State Constitution in the English language does not violate the Due Process and Equal Protection Clauses of the 14th Amendment. The scope of the 14th Amendment deals with other situations, and these clauses are not limited to citizens of the United States but extend to any person, including aliens. If the 14th Amendment regulated State suffrage, then it would not have been necessary for the Nation to adopt the 15th Amendment. This Court has expressly held that the Privileges and Immunities Clause of the 14th Amendment did not confer on anyone the right to vote and did not make suffrage co-extensive with State citizenship (MINOR v. HAPPERSTETT, 88 U. S. 162, 171, 22 L. ed. 627—decided six years after the 14th Amendment was ratified).

The North Carolina literacy test does not violate the 15th Amendment because this Amendment simply removed color as a disqualification to vote, and in this case it is stipulated by counsel that the Appellant is eligible to vote and meets all statutory qualifications except for the fact of her failure, refusal and inability to read any section of the Constitution of North Carolina (see Stipulation No. 20, R. 9).

The Constitution and Statute of North Carolina requiring a literacy test does not violate the 17th Amendment which recognizes that the right to vote for senators of the United States is to be determined by the laws of the respective states, and there is nothing in the Amendment that forbids a state from limiting the right of Suffrage to those who can read and write the English language.

ARGUMENT

I

A

THE 3-JUDGE FEDERAL DISTRICT COURT RETAINED JURISDICTION IN THIS CAUSE, AND, THEREFORE, THIS COURT DOES NOT HAVE JURISDICTION.

As heretofore recited, the Appellant brought her action in the District Court of the United States, all the evidence was introduced and the case briefed and argued. The 3-Judge Federal Court stayed action and retained jurisdiction so that the Plaintiff could exhaust the State administrative remedy and could obtain an interpretation as to the validity of the State Statute in the light of the Suffrage provisions of the North Carolina Constitution (LASSITER v. TAYLOR, 152 F. Supp. 295; see Appendix A herein). If the doctrine of Equitable Abstention as developed by this Court and lower federal courts in the last 25 years (CHICAGO v. FIELD-CREST DAIRIES, 316 U. S. 168; 86 L. ed. 1355; SPECTOR MOTOR SERVICE v. McLAUGHLIN, 323 U. S. 101, 89 L. ed. 101; AMERICAN FEDERATION OF LABOR v. WATSON, 327 U. S. 582, 90 L. ed. 873; ALBERTSON v. MILLARD, 345 U. S. 242; 97 L. ed. 983; RESCUE ARMY v. MUNICIPAL COURT, 331 U. S. 549, 91 L. ed. 1666; RAILROAD COMMISSION OF TEXAS v. PULLMAN CO., 312 U. S. 496, 85 L. ed. 971; GOVERNMENT & C.E.O.C., CIO v. WINDSOR, 353 U. S. 364, 1 L. ed. 894; EAST COAST LUMBER TERMINAL v. TOWN OF BABYLON, 174 F. 2d 106; BRYAN v. AUSTIN, 148 F. Supp. 563; LASSITER v. TAYLOR, 152 F. Supp. 295) means anything at all and if this Court intends for the district courts to have State questions litigated and then finish the case in the Federal Court, then the procedure in this case cannot be approved by this Court.

The language of the 3-Judge Federal Court in LASSITER v. TAYLOR, supra, shows that the District Court intended

that the case be resumed after the interpretation of the State questions by the Supreme Court of North Carolina. The 3-Judge Federal Court said:

> *"Before we take any action with respect to the act of March 27, 1957,* however, we think it should be interpreted by the Supreme Court of North Carolina in the light of the provisions of the State Constitution." (Emphasis ours)

The opinions and orders of the various federal courts which have followed the doctrine of Equitable Abstention show that it was intended for the case to be finally disposed of by the Federal Court which stayed proceedings until the State Court could pass upon State questions and that it was contemplated that the action would be finaliy disposed of in the Federal Court.

IN GOVERNMENT AND CIVIC EMPLOYEES ORGAN. COM. v. WINDSOR, 116 F. Supp. 354, which was an action for declaratory judgment and an injunction, a 3-Judge Federal Court retained jurisdiction until the State statute could be construed in the light of the Florida Constitution. As to retaining jurisdiction and the further proceedings to be had, after construction in the State Court, the Federal Court said:

> "This action falls within the sweep of the Watson and other cases last referred to and is one in which the court should withhold the exercise of jurisdiction. However, in line with the procedure approved in several of the cited cases, the cause will not be dismissed, but will be retained and remain pending for a reasonable time to permit the exhaustion of such State Administrative and Judicial remedies as may be available; and thereafter such further proceedings will be had as may then appear to be lawful and proper."

This Court approved this procedure, as shown in GOVERNMENT AND C.E.O.C., CIO v. WINDSOR, 353 U. S. 364, 1 L. ed. 2d 894.

IN EAST COAST LUMBER TERMINAL v. TOWN OF BABYLON, 174 F. 2d 106, the Court of Appeals for the Sec-

ond Circuit, in approving the action of the District Court, said:

> "We think that Galston, J., did not intend to hold that he had no jurisdiction—in spite of some of his language—for otherwise he would not have retained the complaint for future action, but would have dismissed it. We read what he said to mean that, although in this case he had jurisdiction, stricti juris, to dispose of all the questions involved, he should, as matter of discretion, remit state issues to state courts for their decision, and suspend his decision as to any federal issues until they acted. With this we agree."

In the case of BRYAN v. AUSTIN, 148 F. Supp. 563, a 3-Judge District Court in applying the doctrine of equitable abstention, said:

> "The case should not be dismissed but should be retained and remain pending to permit the plaintiffs a reasonable time for the exhaustion of state administrative and judicial remedies as may be available; but thereafter such further proceedings, if any, will be had by this court as may then appear to be lawful and proper."

We now quote some of the orders, or mandates, that have been given by this Court as applicable to such situations.

In RAILROAD COMMISSION OF TEXAS v. PULLMAN CO., 312 U. S. 496, 85 L. ed. 971, on remanding the case, this Court said:

> "We therefore remand the cause to the district court with directions to retain the bill pending a determination of proceedings, to be brought with reasonable promptness, in the state court in conformity with this opinion."

In SPECTOR MOTOR SERVICE v. McLAUGHLIN, 323 U. S. 101, 89 L. ed. 101, this Court said:

> "Avoidance of such guesswork, by holding the litigation in the federal courts until definite determinations on local law are made by the state courts, merely heeds this time-honored canon of constitutional adjudication. * * *

> "We therefore vacate the judgment of the Circuit Court of Appeals and remand the cause to the District Court with directions to retain the bill pending the determination of proceedings to be brought with reasonable promptitude in the State court in conformity with this opinion."

In CHICAGO v. FIELDCREST DAIRIES, 316 U. S. 168, 86 L. ed. 1355, the mandate of this Court was as follows:

> "We therefore vacate the judgment and remand the cause to the District Court with directions to retain the bill pending a determination of proceedings in the state court in conformity with this opinion.
>
> "It is so ordered."

See also the mandate of this Court in AMERICAN FEDERATION OF LABOR v. WATSON, 327 U. S. 582, 90 L. ed. 873, and in GLENN v. FIELD PACKING CO., 290 U. S. 177, 78 L. ed. 252.

We can well see why the Appellant wishes to now avoid the 3-Judge Federal Court in which she instituted her action because that Court has said:

> "At the hearing, it was shown, without contradiction, that the literacy test was applied by the registrar to white persons and Negroes alike without discrimination; and the cross-examination of the three Negro women who were denied registration by the registrar amply established adequate basis for the denial if the literacy test is valid. The contention of counsel for plaintiffs on the record made at the hearing, as we understand it, is not that the literacy test was discriminatingly applied against their clients, but that it is inherently void."

If this Court will read the Stipulations of Counsel (R. 6) it will see that there is not a single Stipulation from which it can even be inferred that the Registrar of Seaboard voting precinct of Northampton County has in anywise practiced any discrimination as between white and colored in applying the literacy test. The Appellant has violated the Order, or Mandate, of the 3-Judge Federal Court because that Court

instructed her to obtain a State interpretation and then fini
her case in the Federal Court. Because she now finds th
the 3-Judge Federal Court says that a literacy test is va
and there has been no discrimination practiced against h
she should not be allowed to avoid the consequences of h
own case which she chose to institute according to the jur
diction of the Federal District Court.

B

THE SUPREME COURT OF NORTH CAROLINA DID NO
DECIDE THE FEDERAL CONSTITUTIONAL ISSUE

If this Court will examine the Opinion of the Supreme Cou
of North Carolina (R. 24) it will find that the Chief Justice
the Supreme Court of North Carolina stated and passed upo
only one question, as follows, and we quote from the Opinio
of the Supreme Court of North Carolina:

> "The immediate question on this appeal is this: Is Plai
> tiff, upon the agreed statement of facts, entitled to regi
> ter for voting without meeting the test of reading a
> writing any section of the Constitution of North Caroli
> in the English language, as required by G. S. 163-28,
> amended?"

If the Court will then read the Opinion straight through
the end it will see that it consists entirely of a discussion
State constitutional questions. The whole scope of the Opi
ion is on State questions, and the mere fact that a stateme
is made in the last sentence of the Opinion as to the 14th, 15
or 17th Amendments to the Federal Constitution does n
mean that there was an express decision of such feder
questions. There is nothing in the Judgment of the Superi
Court of Northampton County, which Judgment was r
viewed by the Supreme Court of North Carolina, to indica
that the Superior Court of general jurisdiction passed upo
any federal constitutional questions at all. If this Court w
examine the Judgment of the Superior Court of Northampto
County (R. 12, 13) it will see that the Judge of the Superi
Court expressly stated (R. 13) that the Plaintiff was

entitled to be registered for the reason that she did not meet the requirements of Chapter 163, Sec. 25 of the General Statutes of North Carolina. There is nothing to show that this Judge of the Court of general jurisdiction passed on any Federal questions whatsoever.

In this view of the case certain language of this Court to our minds is decisive (BLACK v. CUTTER LABORATORIES, 351 U. S. 292, 100 L. ed. 1188, 76 S. Ct. 824):

> "The majority opinion of the Supreme Court of California contains broad statements to the effect that specific performance of the arbitration award would violate the public policy of the State. Petitioner's constitutional arguments are based on the belief that these statements established the ground on which the judgment below was based, and that therefore the decision below not only establishes a conclusive presumption of advocacy of violence from the mere fact of membership in the Communist Party, but renders unenforceable substantially all contracts entered into by members of the Party.
>
> "This Court, however, reviews judgments, not statements in opinion. Herb v. Pitcairn, 324 U. S. 117, 125, 126, 89 L. ed. 789, 794, 795, 65 S. Ct. 459; Morrison v. Watson, 154 U. S. 111, 115, 38 L. ed. 927, 929, 14 S. Ct. 995. See also Williams v. Norris (US) 12 Wheat 117, 118, 120, 6 L. ed. 571, 572. At times, the atmosphere in which an opinion is written may become so surcharged that unnecessarily broad statements are made. In such a case, it is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the ground on which the judgment rests. This means no more than that we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds. Herb v. Pitcairn (US) supra; Williams v. Kaiser, 323 US 471, 477, 89 L. ed. 398, 403, 65 S. Ct. 363."

C

IF THIS COURT HOLDS THAT THE SUPREME COURT OF NORTH CAROLINA DECIDED BOTH STATE AND FEDERAL QUESTIONS, THEN THE DECISION OF THE STATE COURT RESTS UPON NONFEDERAL

GROUNDS, WHICH FAIRLY, INDEPENDENTLY AND ADEQUATELY SUPPORTS THE STATE COURT JUDGMENT.

This argument is based upon the theory that this Court may be of the opinion that the Supreme Court of North Carolina decided both State and Federal constitutional questions. If this is the true state of affairs, then we think it is the rule, as decided by this Court, that where the nonfederal ground is independent and adequate and is sufficiently broad to maintain the judgment of the State Court without reference to the Federal question, then this Court does not take jurisdiction. It is also true that this Court says that the nonfederal ground must also be tenable (WARD v. BOARD OF COUNTY COMMISSIONERS, 253 U. S. 17, 64 L. ed 751). By this, as we understand it, the nonfederal ground asserted must not be a mere device to prevent a review of the decision of the federal question, or, in other words, it must not be a mere pre-text or cloak to evade the decision of the federal question.

The decision of the Supreme Court of North Carolina in this case can independently, adequately and tenably rest upon the construction of the State Constitution and the validity of the registration statute as measured by the State Constitution. We have here not interwoven federal and nonfederal grounds. The ultimate decision on federal constitutional questions, as we have explained above, remains with the District Court of the United States for the Eastern District of North Carolina based upon the evidence and facts as developed by that Court. Any decision of the Supreme Court of North Carolina on the federal constitutional question could not be final because ultimate finality on such questions belongs to the Federal Courts.

ENTERPRISE IRRIG. DIST. v. FARMERS' MUT. CANAL CO., 243 U. S. 157, 61 L. ed. 644;

ARKANSAS S. R. CO. v. GERMAN NAT. BANK, 207 U. S. 270, 52 L. ed. 201;

HERB v. PITCAIRN, 324 U. S. 117, 89 L. ed. 789;

FOX FILM CORP. v. MULLER, 296 U. S. 207, 80 L. ed. 158;

DOYLE v. ATWELL, 261 U. S. 590, 67 L. ed. 814;

BEREA COLLEGE v. KENTUCKY, 211 U. S. 45, 53 L. ed. 81;

MINNESOTA v. NATIONAL TEA CO., 309 U. S. 551, 84 L. ed. 929.

There, of course, are many cases on this subject, and it is beyond the scope of this Brief to marshall all of the authorities and to try to draw fine lines of distinction. The rule is perhaps explained best in ENTERPRISE IRRIG. DIST. v. FARMERS' MUT. CANAL CO., supra, where this Court said:

> "Thus we are concerned with a judgment placed upon two grounds, one involving a Federal question and the other not. In such situations our jurisdiction is tested by inquiring whether the non-Federal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any Federal question and we have no power to disturb it. Hammond v. Johnston, 142 U. S. 73, 78, 35 L. ed. 941, 942, 12 Sup. Ct. Rep. 141; Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Berea College v. Kentucky, 211 U. S. 45, 53, 53 L. ed. 81, 85, 29 Sup. Ct. Rep. 33; Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 116, 53 L. ed. 431, 433, 29 Sup. Ct. Rep. 227; Gaar, S. & Co. v. Shannon, 223 U. S. 468, 56 L. ed. 510, 32 Sup. Ct. Rep. 236; Southern P. Co. v. Schuyler, 227 U. S. 601, 610, 57 L. ed. 662, 668, 43 L. R. A. (NS) 901, 33 Sup. Ct. Rep. 277. It has been so held in cases where the judgment was rested upon a Federal ground and also upon an estoppel. Pierce v. Somerset R. Co. 171 U. S. 641, 648, 43 L. ed. 316, 319, 19 Sup. Ct. Rep. 64; Lowry v. Silver City Gold & S. Min. Co. 179 U. S. 196, 45 L. ed. 151, 21 Sup. Ct. Rep. 104, 21 Mor. Min. Rep. 113. But where the non-Federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain. See Moran v. Horsky, 178 U. S. 205, 208, 44 L. ed. 1038, 1039, 20 Sup. Ct. Rep. 856; Creswill v. Grand Lodge, K. P. 225 U. S. 246, 261, 56 L. ed. 1074,

1080, 32 Sup. Ct. Rep. 822. And this is true also where the non-Federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review, of the decision upon the Federal question. Leathe v. Thomas, 207 U. S. 93, 99, 52 L. ed. 118, 120, 28 Sup. Ct. Rep. 30; Vandalia R. Co. v. Indiana, 207 U. S. 359, 367, 52 L. ed. 246, 248, 28 Sup. Ct. Rep. 130. But, where the non-Federal ground has fair support, we are not at liberty to inquire whether it is right or wrong, but must accept it, as we do other state decisions of non-Federal questions. Murdock v. Memphis, 20 Wall. 590, 635, 22 L. ed. 429, 444; Eustis v. Bolles, 150 U. S. 369, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131, Leathe v. Thomas, supra; Arkansas Southern R. Co. v. German Nat. Bank, 207 U. S. 270, 275, 52 L. ed. 201, 203, 28 Sup. Ct. Rep. 78."

D

IN VIEW OF THE FORMER DECISIONS OF THIS COURT THE CONSTITUTIONALITY OF A LITERACY TEST HAS BEEN DECIDED, AND, THEREFORE, THERE IS NO SUBSTANTIAL FEDERAL QUESTION RAISED BY APPELLANT.

It is clear that the 3-Judge Federal Court (LASSITER v. TAYLOR, 152 F. Supp. 295) thought that the question as to the validity of a literacy test had long been settled by this Court. We take the same position and quote the reasons from the Opinion of the 3-Judge Federal Court, as follows:

"At the hearing, it was shown, *without contradiction*, that the literacy test was applied by the Registrar to white persons and Negroes alike without discrimination. * * * Attention is called to the fact that 19 States of the Union, *only 7 of which are Southern States*, prescribe educational qualifications for suffrage which are uniformly upheld and that the Supreme Court has approved them, saying in GUINN v. UNITED STATES, supra, 238 U. S. at p. 360, 35 Supreme Court, at p. 929:

"'No question is raised by the government concerning the validity of the literacy test provided for in the amendment under consideration as an independent standard since the conclusion is plain that that test rests on the exercise of state judgment and therefore cannot

be here assailed either by disregarding the state's power to judge on the subject or by testing its motive in enacting the provision.'" (Emphasis ours)

See also the following cases;

GUINN v. UNITED STATES, 238 U. S. 347, 360, 35 S. Ct. 932;

WILLIAMS v. STATE OF MISSISSIPPI, 170 U. S. 213, 18 S. Ct. 583, 42 L. ed. 1012;

DAVIS v. SCHNELL, D. C., 81 F. Supp. 872, aff'd 336 U. S. 933, 69 S. Ct. 749, 93 L. ed. 1093;

TRUDEAU v. BARNES, 5 Cir.; 65 F. 2d 563, cert. den. 290 U. S. 659, 54 S. Ct. 74, 78 L. ed. 571.

II

THE STATES HAVE A RIGHT TO REQUIRE THAT AN APPLICANT FOR REGISTRATION SHALL BE ABLE TO READ AND WRITE A PROVISION OF THE STATE CONSTITUTION IN THE ENGLISH LANGUAGE, AND THIS REQUIREMENT DOES NOT VIOLATE ANY CLAUSE OF THE FOURTEENTH AMENDMENT.

A

THE CONSTRUCTION OF THE CONSTITUTION OF THE STATE OF NORTH CAROLINA BY ITS SUPREME COURT AND DECISION OF THE SUPREME COURT OF NORTH CAROLINA SUSTAINING THE VALIDITY OF THE LITERACY TEST AS MEASURED BY THE STATE CONSTITUTION SHOULD BE ACCEPTED BY THIS COURT.

Beginning on R. 25 the Supreme Court of North Carolina in its Opinion traces the history of Article VI of the Constitution of North Carolina relating to Suffrage and the various amendments made to this Article. The Supreme Court of

North Carolina came to the conclusion that Article VI, as i
now appears in the State Constitution, (Appendix B herein
is valid and contains the proper provisions, and, furthermor
that G. S. 163-28 is valid when measured by the State Consti
tution. We ask this Court to accept the construction of th
highest appellate court of North Carolina as to its own Stat
Constitution and its own statute construed in the light o
the State Constitution.

AMERICAN FEDERATION OF LABOR v. WATSON
327 U. S. 582, 90 L. ed. 873, 66 S. Ct. 761;

PHILLIPS v. UNITED STATES, 312 U. S. 246, 85 L. ed
800, 61 S. Ct. 480;

BENEFICIAL INDUS. LOAN CORP. v. SMITH, 33
U. S. 541, 93 L. ed. 1528, 69 S. Ct. 1221;

HIGHLAND FARMS DAIRY v. AGNEW, 300 U. S. 608
81 L. ed. 835, 57 S. Ct. 549;

GLENN v. FIELD PACKING CO., 290 U. S. 177, 78 L
ed. 252, 54 S. Ct. 138;

DOUGLAS v. NOBEL, 261 U. S. 165, 67 L. ed. 590;
S. Ct. 303;

LOUISVILLE GAS & ELECTRIC CO. v. COLEMAN
277 U. S. 32, 72 L. ed. 770, 48 S. Ct. 423.

B

THE VALIDITY OF THE SO-CALLED "GRANDFATHER
CLAUSE.

In view of the former decisions of this Court the Attorne
General of North Carolina does not contend that the so-calle
"grandfather" clause which appears in a portion of Articl
VI, Sec. 4 of the State Constitution, is constitutional an
valid, nor does the Attorney General contend that the statu

tory machinery provided for the administration of the "grandfather" clause (Sec. 163-32 of the General Statutes) is constitutional and valid (GUINN v. UNITED STATES, 238 U. S. 347, 35 S. Ct. 926, 59 L. ed. 1340; LANE v. WILSON, 307 U. S. 368, 59 S. Ct. 872, 83 L. ed. 1281; MYERS v. ANDERSON, 238 U. S. 368, 35 S. Ct. 932, 59 L. ed. 1349.

It should be pointed out that the Appellant herein has never claimed the right to register under this provision, and the evidence in the Federal District Court shows that she is 41-years old. The statute not being valid, it cannot be used by the Appellant as a basis for contending that the literacy test is invalid. The Supreme Court of North Carolina (ALLISON v. SHARP, 209 N. C. 477, 184 S. E. 27 — 1936) has heretofore declared the literacy test of this State to be constitutional and valid, and as to the "grandfather" clause, it said:

> "The provisos (grandfather clause) we do not quote, as they are immaterial, the time limit having expired—1 December 1908."

In other words, the Supreme Court of North Carolina thought that because of the passage of time the effectiveness of this clause had expired and had become quiescent. This is especially true because of the great advance of Negro education in the State of North Carolina, their high rate of attendance in the public schools and the high rate of literacy.

C

THE STATE HAS A RIGHT TO REQUIRE A REASONABLE TEST OF PROSPECTIVE VOTERS, AND THE NORTH CAROLINA STATUTE DOES NOT VIOLATE THE FOURTEENTH AMENDMENT.

When we focus our attention directly on the right of Suffrage, it is clear that the 14th Amendment never did confer on anyone the right to vote. The reach of the Due Process Clause and the Equal Protection Clause extends further than the rights of citizens of the United States and includes aliens.

In fact, Sec. 2 of the 14th Amendment recognizes the right
a state to deny persons the right to vote because it provid
that the lower house of Congress may be reduced because t
state has refused to allow certain male persons to vote b
the section does not authorize any person denied registrati
to sue to compel the granting of registration.

It is plain that there has been no violation of the App
lant's rights under the Due Process of Law Clause. As to pr
cedural Due Process, the North Carolina Statute (Appellan
Brief, p. 8—LASSITER v. TAYLOR, this Appendix, Footno
No. 1) provides an appeal from denial of registration on t
part of the registrar to the county board of elections and fr
this board an appeal is provided to the Superior Court, whi
is a court of general jurisdiction, and from this Court
appeal is provided to the Supreme Court of North Caroli
It cannot be said that a literacy test of reading and writi
a provision of the North Carolina Constitution provides
arbitrary subjective test. Such claims are usually assert
under the authority of YICK WO v. HOPKINS, 118 U. S. 3
6 S. Ct. 1064, 34 L. ed. 220, and the Appellant in this ca
true to form, brings out this decision to support her cau
This argument is disposed of by the case of WILLIAMS
STATE OF MISSISSIPPI, 170 U. S. 213, 42 L. ed. 10
where the Constitution of Mississippi required, among oth
things, that the applicant for registration should be able
read any section of the Constitution or he was required to
able to understand the same when read to him or give
reasonable interpretation thereof. In commenting on t
argument in the Williams case, this Court said:

> "We do not think that this case is brought within t
> ruling in YICK WO v. HOPKINS, SHERIFF, 118 U.
> 356 (30:220) In that case the ordinances passed on d
> criminated against laundries conducted in wooden bui
> ings. For the conduct of these the consent of the bo
> of supervisors was required, and not for the conduct
> laundries in brick or stone buildings. It was admitt
> that there were about 320 laundries in the city and co
> ty of San Francisco, of which 240 were owned and c
> ducted by subjects of China, and of the whole numb
> 310 were constructed of wood, the same material t

constitutes nine tenths of the houses of the city, and that the capital invested was not less than $200,000. * * *

"* * * Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. * * *

"* * * This comment is not applicable to the Constitution of Mississippi and its statutes. They do not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them."

This whole argument has again been reviewed by a 3-Judge Federal Court in an attack upon a Mississippi Statute which required every elector to be able to read and write any section of the Constitution and give a reasonable interpretation to the county registrar, and further required that the applicant demonstrate to the registrar a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government. In rejecting the argument based upon YICK WO v. HOPKINS, supra, the Court said (DARBY v. DANIEL, S. D. Miss., 168., F. Supp. 170):

"(2) Plaintiffs base their argument that the constitutional provisions under attack are void on their face chiefly upon four Supreme Court decisions: Yick Wo v. Hopkins, Sheriff, 1886, 118 U. S. 356; Guinn, et al v. United States, *supra;* Lane v. Wilson, 1939, 307 U. S. 268; and Schnell et al v. Davis, 1949, 336 U. S. 933. Analysis of those cases will reveal that they do not apply to the constitutional and statutory provisions before us. * * *

"* * * The Supreme Court rejected the decision of the California Court, holding that the ordinances 'seem intended to confer, and actually do confer, not a discretion, to be exercised upon consideration of the circumstances of each case but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons . . . . The power given to them is not confided to their discretion in the legal sense of that

term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint.' (Pp. 366-367.) The final conclusion of the Supreme Court is epitomized in graphic words copied in the margin. The quotation from the Supreme Court's opinion as applied to the facts there refutes the argument the case is called upon to furnish here. The case will be discussed further in our analysis of Schnell, *infra*. The Constitution and statutes of Mississippi do not contain any license for the exercise of arbitrary power. Plaintiffs are entitled to relief here if they can show the discrimination which was admitted there. * * *

"* * * Viewed most favorably to the contentions of the plaintiffs here, it would be assumed that the Supreme Court decided that the Boswell Amendment placed final and arbitrary powers in the hands of the board of registrars, which power the board had in fact exercised arbitrarily in favor of white applicants and against Negro applicants. As shown above, this was the ground common to Lane and Yick Wo, the two cases forming the predicate for the Supreme Court's action in Schnell.

"It is important to note that the Supreme Court, after citing these two cases, directed a comparison with Williams v. Mississippi 1898, 170 U. S. 213. There, the literacy tests of the Mississippi Constitution of 1880 were upheld and, as demonstrated infra, the Court held categorically that the doctrine of Yick Wo did not apply. The clear meaning of the reference to the three cases by the Supreme Court was that in contrast with the valid requirements of the Mississippi Constitution, the Boswell Amendment involved in *Schnell* came under the condemnation of the two cases wherein the Supreme Court had pointed out specifically that arbitrary power granted and discriminatorily used could not stand the test of constitutionality."

The above cited case, DARBY v. DANIEL, 168 F. Supp. 170, discusses the whole question of literacy and upholds the revised test required by the Mississippi Constitution, which is far more rigid than the test now before the Court. The North Carolina statute does not require any explanation of any of the provisions of the Constitution, and, in fact, the language of the sections can be fairly interpreted as meaning that the Appellant can take her own section to read and

write. The findings of fact show that the Appellant admits that she cannot read and write and there is no finding of fact showing any discrimination as between white and colored applicants for registration. In fact, the Opinion of the 3-Judge Federal Court (LASSITER v. TAYLOR, supra) specifically states:

> "At the hearing, it was shown, without contradiction, that the literacy test was applied by the registrar to white persons and Negroes alike without discrimination; that cross-examination of the three Negro women who were denied registration by the registrar amply established adequate basis for the denial if the literacy test is valid."

It is well settled that it is within the power of the states to provide qualifications as to conditions precedent to voting and also to provide for the orderly administration of the Suffrage privilege for the purpose of preventing fraud.

UNITED STATES v. CRUIKSHANK, 92 U. S. 542, 555, 23 L. ed. 588;

MINOR v. HAPPERSETT, 88 U. S. 162, 170, 22 L. ed. 627;

MITCHELL v. WRIGHT, 69 F. Supp. 698, 703;

UNITED STATES v. REESE, 92 U. S. 214, 217, 23 L. ed. 563;

DAVIS v. SCHNELL, 81 F. Supp. 872, 876; aff'd. 336 U. S. 933, 93 L. ed. 1093;

TRUDEAU v. BARNES, 65 F. 2d 563; cert. den. 290 U. S. 659;

SNOWDEN v. HUGHES, 321 U. S. 1, 7, 88 L. ed. 497.

Suffrage is a political right reserved and retained by the states subject to federal constitutional limitations against arbitrary and discriminatory practices. The right to vote is a political right and is not on a parity with so-called "civil

rights", "vested rights" or "property rights", and the right of Suffrage is not conferred by the United States Constitution. It is derived from the states under their constitutions and statutes.

POPE v. WILLIAMS, 193 U. S. 621, 48 L. ed. 817;

UNITED STATES v. CRUIKSHANK, 92 U. S. 542, 555, 23 L. ed. 588;

MASON v. MISSOURI, 179 U. S. 328, 335, 45 L. ed. 214;

MINOR v. HAPPERSETT, 88 U. S. 162, 172, 173, 22 L. ed. 627;

BREEDLOVE v. SUTTLES, 302 U. S. 277, 283, 82 L. ed. 252;

SMITH v. BLACKWELL, 34 F. Supp. 989, aff'd. 115 F. 2d 186.

It is the contention of the Attorney General of North Carolina that a literacy test such as ours has already been upheld by this Court, and it is too late now to make an attack on its validity. In GUINN v. UNITED STATES, supra, this Court said:

> "No time need be spent on the question of the validity of the literacy test, considered alone, since, as we have seen, its establishment was but the exercise by the state of lawful power vested in it, not subject to our supervision, and indeed, its validity is admitted. Whether this test is so connected with the other one relating to the situation on January 1, 1866, that the invalidity of the latter requires the rejection of the former, is really a question of state law; but, in the absence of any decision on the subject by the supreme court of the state, we must determine it for ourselves. *We are of opinion that neither forms of classification nor methods of enumeration should be made the basis of striking down a provision which was independently legal, and therefore was lawfully enacted, because of the removal of an illegal provision with which the legal provision or provisions may have been associated.*" (*Emphasis ours*)

See also:

WILLIAMS v. STATE OF MISSISSIPPI, 170 U. S. 213, 18 S. Ct. 583, 42 L. ed. 1012;

DAVIS v. SCHNELL, D. C., 81 F. Supp. 872, aff'd. 336 U. S. 933, 69 S. Ct. 749, 93 L. ed. 1093;

TRUDEAU v. BARNES, C. C. A. 5, 65 F. 2d 563, cert. den. 290 U. S. 659, 54 S. Ct. 74, 78 L. ed. 571.

The case of DAVIS v. SCHNELL, 81 F. Supp. 872 does not support the Appellant's contentions that a literacy test standing alone is invalid. In fact, this case supports our contention because as to the literacy test alone, the Court was careful to say:

> "The states, not the Federal Government, prescribe the the qualifications for the exercise of the franchise, and Federal Courts are not interested in these qualifications unless they contravene the Fifteenth Amendment or other provisions of the United States Constitution : . .
>
> "The original Section 181 of the Constitution of Alabama has stood for nearly 50 years AND HAS PROVIDED DEFINITE STANDARDS FOR PASSING UPON THE QUALIFICATIONS OF PROSPECTIVE ELECTORS. The original section provided for two qualifications, the possession of either of which was sufficient to permit registration. An applicant was required to be able to 'read and write any article of the Constitution of the United States in the English language,' or in the alternative, he could qualify if he owned, assessed and paid taxes on real or personal property of an assessed value of $300. The Boswell Amendment dropped the property qualification, and adopted a qualification requiring not only that an applicant be able to 'read and write,' but also that he be able to understand and explain any article of the Constitution of the United States in the English language." 81 F. Supp., at pp. 876-877.

This leaves for consideration the Privileges and Immunities Clause of the 14th Amendment. This Court has held on several occasions that this Clause does not confer on anyone the right to vote or restrict the State in its power to impose

reasonable educational requirements, and this, of course, must be true as to all clauses of the 14th Amendment or it would not have been necessary to have adopted the 15th Amendment.

In MINOR v. HAPPERSTETT, 88 U. S. 162, 171, 22 L. ed. 627 (1874) decided just six years after the 14th Amendment was ratified, the United States Supreme Court speaking through Chief Justice Waite, said:

> "The Amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. No new voters were necessarily made by it. Indirectly, it may have had that effect, because it may have increased the number of citizens entitled to suffrage under the Constitution and laws of the United States, but it operates for this purpose, if at all, through the States and the State laws, and not directly upon the citizens.
>
> "It is clear, therefore, we think, that the Constitution has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted. This makes it proper to inquire whether suffrage was co-extensive with the citizenship of the States at the time of its adoption. If it was, then it may with force be argued that suffrage was one of the rights which belonged to citizenship, and in the enjoyment of which every citizen must be protected. But if it was not, the contrary may with propriety be assumed.
>
> "When the Federal Constitution was adopted, all the States with the exception of Rhode Island and Connecticut had constitutions of their own. These two continued to act under their charters from the Crown. Upon an examination of these constitutions we find that in no State were all citizens permitted to vote. Each State determined who should have that power. (A review of the diverse requirements of the eleven states having constitutions of their own in 1789 then follows.)
>
> "In this condition of the law in respect to suffrage in the several states it cannot for a moment be doubted that if it had been intended to make all citizens of the United States voters, the framers of the Constitution would not have left it to implication. So important a change in the

condition of citizenship as it actually existed, if intended, would have been expressly declared . . . .

"And still again, after the adoption of the Fourteenth Amendment, it was deemed necessary to adopt a Fifteenth as follows: 'The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State, on account of race, color or previous condition of servitude.' The Fourteenth Amendment had already provided that no State should make or enforce any law which should abridge the privileges or immunities of citizens of the United States. If suffrage was one of these privileges or immunities, why amend the Constitution to prevent its being denied on account of race? Nothing is more evident than that the greater must include the less, and if all were already protected why go through with the form of amending the Constitution to protect a part?"

In *Pope v. Williams*, 193 U. S. 621, 48 L. ed. 817, 24 S. Ct. 573 (1903), the Court speaking through Mr. Justice Peckham said:

"The privilege to vote in any State is not given by the Federal Constitution or by any of its amendments. It is not a privilege springing from citizenship of the United States. It may not be refused on account of race, color, or previous condition of servitude, but it does not follow from mere citizenship of the United States. *In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution.*" (Emphasis ours)

There is no contention by the Appellant that G. S. 163-28, or the Registrar, the Board, or the Superior Court in administering it makes or made any discrimination between individuals. It is conceded that the appellant is not able to read and write any section of the Constitution of North Carolina, and it is not contended that she has been treated differently from any other person of like illiteracy.

In BREEDLOVE v. SUTTLES, 302 U. S. 277, 283 (1937), the Court speaking through Mr. Justice Butler said:

"To make payment of poll taxes a prerequisite of voting is not to deny any privilege or immunity protected by the Fourteenth Amendment. *Privilege of voting is not derived from the United States but is conferred by the State and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the State may condition suffrage as it deems appropriate.*" (Emphasis ours)

See also: PIRTLE v. BROWN, 118 Fed. 2d 218, cert. den. 314 U. S. 621, 86 L. ed. 499, 62 S. Ct. 64 (1942); U. S. v. ANTHONY, 24 Fed. Cas. No. 14, 459 (C. C. N. Y., 1873); DAVIS v. TEAGUE, 220 Ala. 309, 125 So. 51, App. dismissed, 281 U. S. 695, 74 L. ed. 1123, 50 S. Ct. 248.

D

REQUIRING A PERSON TO BE ABLE TO READ AND WRITE A PROVISION OF A STATE CONSTITUTION AS A LITERACY TEST DOES NOT VIOLATE THE FIFTEENTH AMENDMENT.

The 15th Amendment does not grant any affirmative right of Suffrage. It merely provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude." It is true that where States originally confined the right of Suffrage to white men that in this sense the Amendment can be considered as conferring a right of Suffrage. It is believed, however, that the general result is merely to remove the disability of color, that the Amendment is negative in its approach, and this leaves colored people on the same basis as white people as to Suffrage and subject to the same privileges and disqualifications Certainly in this case no question arises under the 15th Amendment since no racial test was imposed but merely a literacy test which the 3-Judge Federal Court found was imposed without discrimination. It is stipulated in Stipulation No. 20 that aside from the Appellant's failure, refusal and inability to read and write any section of the Constitution of North Carolina the Appellant meets all statutory qualifi-

cations for registration. Appellant seems to take the view that illiteracy and membership in her race are one and the same thing but this is not true. According to the estimates of the State Board of Education during the Year of 1958 there were 747,725 white pupils in the public schools of the State, and there were 313,446 colored students in the public school system of the State. Roughly speaking, the ratio of the colored population to the white lies somewhere between twenty and thirty percent, or, in other words, somewhere between twenty and thirty percent of the total population is colored. It will thus be seen that the number of colored students in the public schools is a very high ratio in proportion to the colored population. That the 15th Amendment is not applicable, see: UNITED STATES v. REESE, 92 U. S. 214, 23 L. ed. 563; UNITED STATES v. CRUIKSHANK, 92 U. S. 555, 23 L. ed. 588; GUINN v. UNITED STATES, 238 U. S. 347, 35 S. Ct. 926, 59 L. ed. 1340.

The cases cited by the Appellant, dealing with primaries and elections, in our opinion have nothing to do with the questions herein involved. There was no question as to the eligibility of voters in the CLASSIC CASE and in the ALL-WRIGHT CASE.

E.

THE NORTH CAROLINA LITERACY TEST DOES NOT VIOLATE THE SEVENTEENTH AMENDMENT.

It is hard to see how Appellant can contend that the literacy test provisions of the North Carolina Constitution and as embodied in G. S. 163-28 can violate the 17th Amendment. On the contrary, the 17th Amendment recognizes the authority of the States in the Suffrage field, for it says: "The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

That the appellate courts of the various States are in accord with the general interpretations and arguments in this Brief, see: ALLEN v. MERRILL, 305 P. 2d 490 (Utah);

FRANKLIN v. HARPER, 55 S. E. 2d 221 (Ga.); WILKINSON v. QUEEN, 269 S. W. 2d 223 (Ky.); FISCELLA v. NULTON, 92 A. 2d 103 (N. J.); MORRISON v. LAMARRE, 65 A. 2d 217 (R. I.); TEDESCO v. BOARD OF SUPERVISORS OF ELECTIONS, 43 So. 2d 514 (La.).

The requirement as to reading and writing does not demand perfect English but the test is the ability to read in a reasonably intelligent manner and to write in a fairly legible way, and the test can be complied with even though every word may not be accurately pronounced or spelled. See: HELTON v. BURDETTE, 203 S. W. 189 (Ky.) and WILLIAMS v. HAYS, 193 S. E. 1046 (Ky.). That an applicant in order to meet the test does not have to read English fluently, see also HILL v. HOWELL, 127 P. 211; 215 (Wash.).

That such a literacy provision is not an unconstitutional delegation of power, see DOUGLAS v. NOBEL, 261 U. S. 165, 67 L. ed. 590, 43 S. Ct. 303.

CONCLUSION

The various States of the Union have had literacy tests in some form or other for many decades. It is submitted that reading and writing a provision of a State constitution is a very minimum considering the educational facilities of the State. The Court will find in Appendix C in this Brief the number of states having literacy tests, which information is derived from a pamphlet published by the Council of State Governments, March, 1956, designated as Volume XII, and entitled "Qualifications for Voting—Summaries of State Laws Governing Voter Qualifications, Registration and Penalties for Violations—Constitutional and Statutory Provisions of the States; BX-302". It is submitted that a democratic government depends upon the education and mental alertness of its citizens. It was not intended that everyone should be reduced to the lowest common denominator, and while equality of opportunity is inherent in our governmental structure, neverthelss, it is submitted that our form of gov-

ernment guarantees the right to be unequal. Certainly Robert M. Hutchins, former college president, and now President of the Fund for the Republic, cannot be classed as a reactionary. In his speech entitled "Is Democracy Possible?" which he made on receiving the Sydney Hillman Award for Meritorious Public Service, in commenting on his faith in a democratic form of government, he said:

> "The faith rests on the propositions that man is a political animal that participation in political decisions is necessary to his fullfillment and happiness, *that all men can and must be sufficiently educated and informed to take part in making these decisions*, that protection against arbitrary power, though indispensable, is insufficient to make either free individuals or a free society; that such a society must make positive provisions for its development into a community learning together; for this is what political participation, government by consent and the civilization of the dialogue all add up to." (Emphasis ours)

The Attorney General asks this Court to affirm the decision below.

Respectfully submitted,

MALCOLM B. SEAWELL
Attorney General of North Carolina

RALPH MOODY
Assistant Attorney General

Counsel for the State of North Carolina
Amicus Curiae

APPENDIX A

LOUISE LASSITER, et al., Plaintiffs

v.

HELEN H. TAYLOR, Registrar Seaboard Precinct, Defendant.

No. 1019

UNITED STATES DISTRICT COURT
E. D. North Carolina
Raleigh Division.

Argued April 19, 1957

Decided June 10, 1957

Taylor & Mitchell, Raleigh, N. C., and James R. Walker, Statesville, N. C., for plaintiffs.

Vinson Bridgers, of Fountain, Fountain, Bridgers & Horton, Tarboro, N. C., E. N. Riddle, Charlotte, N. C., George Patton, Atty. Gen., and Robert Giles, Assistant Attorney General of North Carolina, for defendant.

Before PARKER, Chief Judge, and GILLIAM and WARLICK, District Judges.

PER CURIAM.

This is an action begun as a class action by a Negro woman resident in Northampton County, North Carolina, against the registrar of the voting precinct in which she resides, to have the Court declare unconstitutional and void the literacy test for voters prescribed by Section 4 of Article VI of the Constitution of North Carolina and Sections 163-28 of the General Statutes of North Carolina as that section appeared at the time of the institution of the action and for an injunc-

tion restraining the Registrar from denying registration to plaintiff on the ground of failure to comply with the literacy test. After the action was instituted, the General Assembly of North Carolina enacted a statute, the effect of which was to repeal the old statute containing the so-called "grandfather clause" and requiring that ability to read and write be shown to the satisfaction of the registrar and to substitute therefor a statute prescribing a literacy test without any "grandfather" clause and without any reference to "satisfaction of the registrar", and providing an appeal from the action of the registrar from denial of registration to the county board of elections and thence to the Superior Court of the County. Act of March 29, 1957. This statute was attacked as unconstitutional in a reply filed by plaintiff. Two other Negro women who had been denied registration by the same registrar were allowed to intervene and make themselves parties to the action. A court of three judges was constituted as required by statute, a hearing was had at which the parties were allowed to introduce all the evidence which they offered, were heard at length on their contentions and were allowed additional time for the filing of briefs.

At the hearing, it was shown, without contradiction, that the literacy test was applied by the registrar to white persons and Negroes alike without discrimination; and the cross examination of the three Negro women who were denied registration by the Registrar amply established adequate basis for the denial if the literacy test is valid. The contention of counsel for plaintiffs on the record made at the hearing, as we understand it, is not that the literacy test was discriminatingly applied against their clients, but that it is inherently void.

No question remains in the case with respect to Section 163-28 of the General Statutes as that section read at the time of the institution of this action. Neither injunction nor declaratory relief with regard thereto is appropriate, as that section with its "grandfather clause" and with its requirement that ability to read and write be shown to the satisfaction of the registrar has been superseded by the Act of March

29, 1957, which contains neither of these provisions and which provides administrative remedies for those claiming that they have been improperly denied the right to register.[1]

The only question in the case is whether the Act of March 29, 1957 should be declared void and its enforcement against plaintiffs enjoined by the court on the ground that it is violative of their rights under the Federal Constitution. We need not consider whether it is violative of provisions of the State Constitution, as argued by plaintiffs; for this does not present a federal question. And no question is presented as to its being discriminatorily applied to plaintiffs, since plaintiffs have not applied for registration under its provisions and have not exhausted the administrative remedies which it provides. Plaintiffs argue, however, that it is unconstitutional because they say it was enacted pursuant to the provisions of Article VI, Section 4 of the State Constitution and is vitiated by the discriminatory provisions contained in that section.[2]

There can be no question but that Article VI, Section 4 of the State Constitution was, when enacted, void as violative of the provisions of the 14th and 15th Amendments to the Constitution of the United States. Guinn v. United States, 238 U. S. 347, 35 S. Ct. 926, 59 L. Ed. 1340; Myers v. Anderson, 238 U. S. 368, 35 S. Ct. 932, 59 L. Ed. 1349. It is argued, however, that the "grandfather clause" of that section has no application to voters who reached voting age subsequent to 1908, approximately 50 years ago, and that the "grandfather clause," which would render the section void, no longer has any practical application. It is further argued that, if the section be held void, the state has the right to prescribe an educational qualification for suffrage in the exercise of its sovereign power as a state, since the provisions of a state constitution are limitations upon and not grants of power. 11 Am. Jur. p. 619. Attention is called to the fact that nineteen states of the Union,[3] only seven of which are Southern states, prescribe educational qualifications for suffrage which are uniformly upheld[4] and that the Supreme Court has approved them, saying in Guinn v. United States, supra, 238 U. S. at page 360, 35 S. Ct. at page 929:

"No question is raised by the government concerning the validity of the literacy test provided for in the amendment under consideration as an independent standard since the conclusion is plain that that test rests on the exercise of state judgment and therefore cannot be here assailed either by disregarding the state's power to judge on the subject or by testing its motive in enacting the provision."

Before we take any action with respect to the Act of March 27, 1957, however, we think that it should be interpreted by the Supreme Court of North Carolina in the light of the provisions of the State Constitution. Government and Civic Employees Organizing Committee etc. v. S. F. Windsor, 77 S. Ct. 838. We think, also, that administrative remedies provided by the act should be exhausted before action by the federal courts is invoked. We shall accordingly enter an order staying action herein but retaining jurisdiction for a reasonable time to enable plaintiffs to take action in the courts of North Carolina to obtain an interpretation of the statute and to exhaust administrative remedies thereunder.

Action stayed.

Footnotes to Opinion

1. The Act of March 29, 1957 is as follows:

"Sec. 1. Every person presenting himself for registration shall be able to read and write any section of the Constitution of North Carolina in the English language. It shall be the duty of each registrar to administer the provisions of this section.

"Sec. 2. Any person who is denied registration for any reason may appeal the decision of the registrar to the county board of elections of the county in which the precinct is located. Notice of appeal shall be filed with the registrar who denied registration, on the day of denial or by 5:00 p. m. on the day following the day of denial. The notice of appeal shall be in writing, signed by the appealing party, and shall set forth the name, age and address of the appealing party, and shall state the reasons for appeal.

"Sec. 3. Every registrar receiving a notice of appeal shall promptly file such notice with the county board of elections, and every person appealing to the county board of elections shall be entitled to a prompt and fair hearing on the question of such person's right and qualifications to register as a voter. A majority of the members of the board shall be the decision of the board. All cases on appeal to a county board of elections shall be heard de novo, and the board is authorized to subpoena witnesses and to compel their attendance and testimony under oath, and is further authorized to subpoena papers and documents relevant to any matter pending before the board. If at the hearing the board shall find that the person appealing from the decision of the registrar is able to read and write any section of the Constitution of North Carolina in the English language and if the board further finds that such person meets all other requirements of law for registration as a voter in the precinct to which application was made, the board shall enter an order directing that such person be registered as a voter in the precinct from which the appeal was taken. The county board of elections shall not be authorized to order registration in any precinct other than the one from which an appeal has been taken. Each appealing party shall be notified of the board's decision in his case not later than ten (10) days after the hearing before the board.

"Sec. 4. Any person aggrieved by a final order of a county board of elections may at any time within ten (10) days from the date of such order appeal therefrom to the Superior Court of the county in which the board is located. Upon such appeal, the appealing party shall be the plaintiff and the county board of elections shall be the defendant, and the matter shall be heard de novo in the superior court in the same manner as other civil actions are tried and disposed of therein. If the decision of the court be that the order of the county board of elections shall be set aside, then the court shall enter its order so providing and adjudging that such person is entitled to be registered as a qualified voter in the precinct to which application was originally made, and in such case the name of such person shall be entered on the registration books of that precinct. The court shall not be

authorized to order the registration of any person in a precinct to which application was not made prior to the proceeding in court. From the judgment of the superior court an appeal may be taken to the Supreme Court in the same manner as other appeals are taken from judgments of such court in civil actions.

"Sec. 5. All laws and clauses of laws in conflict with this Act are hereby repealed.

"Sec. 6. This Act shall be effective upon its ratification."

2. Article VI, Section 4 of the Constitution of North Carolina is as follows:

"Sec. 4. Qualification for registration.—Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language. But no male person who was, on January 1, 1867, or at any time prior thereto, entitled to vote under the laws of any state in the United States wherein he then resided, and no lineal descendant of any such person, shall be denied the right to register and vote at any election in this State by reason of his failure to possess the educational qualifications herein prescribed: Provided, he shall have registered in accordance with the terms of this section prior to December 1, 1908. The General Assembly shall provide for the registration of all persons entitled to vote without the educational qualifications herein prescribed, and shall, on or before November 1, 1908, provide for the making of a permanent record of such registration, and all persons so registered shall forever thereafter have the right to vote in all elections by the people in this State, unless disqualified under section two of this article."

3. The states which prescribe educational qualifications for suffrage are: *Alabama* Tit. 17, sec. 35, Ala. Code; *Arizona* Ariz. Revised Stat. Title 16, sec. 16-101; *California* Deering's Cal. Code, Elections, sec. 220, West's Ann. Elections Code, sec. 220; *Connecticut* Conn. Gen. Stat. Title 11, secs. 991, 992;

Delaware Del. Code Ann. ch. 17, sec. 1701; *Georgia* Ga. Code Ann. secs. 34-117, 34-120, 34-122; *Louisiana* LSA—Revised Stat. of 1950, Title 18, sec. 31; *Maine* Revised Statutes of Maine, ch. 3, sec. 2; *Massachusetts* Const., Articles of Amendment, Art. XX, sec. 122. See also C. 51, sec. 1 of Ann. Laws of Massachusetts; *Mississippi* Miss. Code Ann. sec. 3213; *New Hampshire* Revised State Ann. 55:10-55:16, *New York* McKinney's New York Consolidated Laws, c. 17, Election Law, sec. 150; *Oklahoma* Tit. 26, sec. 61, Okl. Stat. Ann; *Oregon* Ore. Compiled Laws Ann. vol. 5, sec. 81-103; *South Carolina* S. C. Code, sec. 23-62; *Virginia* Const. secs. 30, 20, Code of Va. sec. 24-67 et seq; *Washington* Remington's Revised Stat. of Wash. sec. 5114-11; *Wyoming* Wyoming Compiled Stat. Ann. sec. 31-1205.

4. Guinn v. United States, 238 U. S. 347, 360, 35 S. Ct. 932; Williams v. State of Mississippi, 170 U. S. 213, 18 S. Ct. 583, 42 L. ed. 1012; Davis v. Schnell, D. C., 81 F. Supp. 872, affirmed 336 U. S. 933, 69 S. Ct. 749, 93 L. ed. 1093; Trudeau v. Barnes, 5 Cir., 65 F. 2d 563, certiorari denied 290 U. S. 659, 54 S. Ct. 74, 78 L. ed. 571.

APPENDIX B

ARTICLE VI

SUFFRAGE AND ELIGIBILITY TO OFFICE

Section 1. *Who may vote.* Every person born in the United States, and every person who has been naturalized, twenty-one years of age, and possessing the qualifications set out in this article, shall be entitled to vote at any election by the people of the State, except as herein otherwise provided. (The 19th amendment to the United States Constitution, ratified Aug. 6, 1920, provided that the "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex." North Carolina accordingly by c. 18, Extra Session 1920, provided for the registration and voting of women.)

Sec. 2. *Qualifications of voter.* Any person who shall have resided in the State of North Carolina for one year, and in the precinct, ward or other election district in which such person offers to vote for thirty days next preceding an election, and possessing the other qualifications set out in this Article, shall be entitled to vote at any election held in this State; provided, that removal from one precinct, ward or other election district to another in this State shall not operate to deprive any person of the right to vote in the precinct, ward or other election district from which such person has removed until thirty days after such removal. No person who has been convicted, or who has confessed his guilt in open court upon indictment, of any crime the punishment of which now is, or may hereafter be, imprisonment in the State's Prison, shall be permitted to vote unless the said person shall be first restored to citizenship in the manner prescribed by law.

Sec. 3. *Voters to be registered.* Every person offering to vote shall be at the time a legally registered voter as herein prescribed and in the manner hereafter provided by law, and the General Assembly of North Carolina shall enact general

registration laws to carry into effect the provisions of this article.

Sec. 4. *Qualification for registration.* Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language. But no male person who was, on January 1, 1867, or at any time prior thereto, entitled to vote under the laws of any State in the United States wherein he then resided, and no lineal descendant of any such person, shall be denied the right to register and vote at any election in this State by reason of his failure to possess the educational qualifications herein prescribed: *Provided,* he shall have registered in accordance with the terms of this section prior to December 1, 1908. The General Assembly shall provide for the registration of all persons entitled to vote without the educational qualifications herein prescribed; and shall, on or before November 1, 1908, provide for the making of a permanent record of such registration; and all persons so registered shall forever thereafter have the right to vote in all elections by the people in this State, unless disqualified under section 2 of this article.

Sec. 5. *Indivisible plan; legislative intent.* That this amendment to the Constitution is presented and adopted as one indivisible plan for the regulation of the suffrage, with the intent and purpose to so connect the different parts, and make them so dependent upon each other, that the whole shall stand or fall together.

Sec. 6. *Elections by people and General Assembly.* All elections by the people shall be by ballot, and elections by the General Assembly shall be *viva voce.*

Sec. 7. *Eligibility to office; official oath.* Every voter in North Carolina except as in this article disqualified, shall be eligible to office, but before entering upon the duties of the office, he shall take and subscribe the following oath:

"I, ..., do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the

United States, and the Constitution and laws of North Carolina not inconsistent therewith, and that I will faithfully discharge the duties of my office as ..... So help me, God."

Sec. 8. *Disqualification for office.* The following classes of persons shall be disqualified for office: *first,* all persons who shall deny the being of Almighty God, *second,* all persons who shall have been convicted or confessed their guilt on indictment pending, and whether sentenced or not, or under judgment suspended, of any treason or felony, or of any other crime for which the punishment may be imprisonment in the penitentiary, since becoming citizens of the United States, or of corruption or malpractice in office, unless such person shall be restored to the rights of citizenship in a manner prescribed by law.

Sec. 9. *When this chapter operative.* That this amendment to the Constitution shall go into effect on the first day of July, nineteen hundred and two, if a majority of votes cast at the next general election shall be cast in favor of this suffrage amendment.

APPENDIX C

We give below a brief statement of the literacy test in each state as taken from "Volume XII of the Constitutional and Statutory Provisions of the States," as published by the Council of State Governments, as follows:

ALABAMA

"*Literacy*—Must be able to read and write in English any article of the Constitution of the United States which may be submitted to him by board of registrars (also Code Supp., Sec. 32). Those persons who were registered as voters before 1903 are still qualified and need not register again. (Const. of Alabama, Amendment XCI to Sec. 181)."

ARIZONA

"*Literacy*—Unless physically disabled, must be able to read the Constitution of the United States in English and to write his name."

CALIFORNIA

"*Literacy*—Must be able to read the Constitution in English and to write his name unless physically disabled or unless an elector or over 60 years old on October 10, 1911."

CONNECTICUT

"*Literacy*—Must be able to read in English any article of the Constitution or any section of the statutes of the state."

DELAWARE

"*Literacy*—Must be able to read state constitution in English and to write his name if not physically disabled. This provision shall not apply to persons who were 21 years old or over and were United States citizens on January 1, 1900."

GEORGIA

"*Literacy*—Must be able to read and write correctly in English any paragraph of the Constitution of the United States or of Georgia (Const. of Georgia of 1945, Section 2-704). The registrar shall mark on the registration card whether or not applicant can so read or write and whether inability to do so is due to physical handicap (Code, 1951 Supp., Sections 34-111, 34-120)."

LOUISIANA

"*Literacy*—Shall be able to read and write and unless physically disabled shall fill out his application for registration in writing in English or in his mother tongue and shall sign his name. If he cannot write English, he may write it in his mother tongue from the dictation of an interpreter. If he is unable to sign his name, he may make his mark authenticated by the registrar who shall then read the application to him through an interpreter."

MAINE

"*Literacy*—Unless prevented by physical disability or unless he had the right to vote on January 4, 1893, must be able to read the constitution of the state in English and to write his name (Sec. 20; 1955 Supp., 2)."

MASSACHUSETTS

"*Literacy*—Unless physically disabled, must be able to read the Constitution of Massachusetts in English and to write his name."

MISSISSIPPI

"*Literacy*—Must be able to read any section of state constitution or, if unable to read same, be able to understand same when read to him or give a reasonable interpretation thereof (Code, Sec. 3213)."

NEW HAMPSHIRE

"*Literacy*—No person shall have the right to vote who shall not be able to read the constitution in English and to write unless prevented by a physical disability. This shall not apply to persons who voted in 1903, nor to persons who were 60 years old or over on January 1, 1904 (Const. of New Hampshire, Part First, Bill of Rights, (Art.) 11th; Rev. Laws, ch. 32, Sec. 8)."

NEW YORK

"*Literacy*—Unless he became entitled to vote prior to January 1, 1922, must, in addition to above qualifications, be able to read and write English unless prevented by physical incapacity. (SEE, ALSO: 1955 Supp., Sec. 367)."

NORTH CAROLINA

"*Literacy*—Must be able to read and write any section of the Constitution in English, except that this shall not be required of a male person who was on January 1, 1867, or earlier, entitled to vote under the laws of any state in the United States where he then resided or to a lineal descendant of such person, provided that said elector shall have registered prior to December 1, 1908 (Sections 163-28, 163-32, 163-40)."

OKLAHOMA

"*Literacy*—Must be able to read and write any section of the Constitution of Oklahoma; but this shall not apply to any person who was on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government or who at that time resided in some foreign nation, or to a lineal descendant of such person."

OREGON

"*Literacy*—Must be able to read and write English (also Rev. Stat., Sec. 247.040.)"

OUTH CAROLINA

"*Literacy*—Must be able to read and write any section of tate constitution or must be able to show that he owns and as paid all taxes collectible during previous year on proper- y in this state assessed at $300 or more."

IRGINIA

"*Literacy*—Applicant for registration, unless physically nable to do so, shall make application to the registrar in is own handwriting without aid, suggestion, or memoran- lum in the presence of the registrar (1954 Supp., Sec. 24-68). Iowever, Section 24-450 contains penalty for deceiving voter vho cannot read the language in which ballot is printed."

VASHINGTON

"*Literacy*—Whether applicant was a legal voter of the tate on November 3, 1896, or is able to read and speak Eng- ish so as to comprehend the meaning of ordinary English rose and, in case the registration officer is not satisfied in hat regard, he may require the applicant to read aloud and explain the meaning of some ordinary English prose."

WYOMING

"*Literacy*—Must be able to read the constitution of the tate unless prevented by physical disability, providing that ny person who was a qualified voted on July 10, 1890, shall ontinue to be qualified."